

STATE OF MICHIGAN
COURT OF APPEALS

LAWRENCE M. LEE,

Plaintiff-Appellant,

v

BETTY A. LEE,

Defendant-Appellee.

UNPUBLISHED

April 8, 2004

No. 246183

Arenac Circuit Court

LC No. 96-5047-DO

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

In this divorce proceeding, plaintiff, Lawrence M. Lee, appeals, by leave granted, the circuit court's order enforcing judgment in favor of defendant, Betty A. Lee. We reverse and remand.

I. FACTS

This case arises from a divorce action settled November, 12, 1996. After an approximately twenty-eight-year marriage, plaintiff sued defendant for divorce. The parties reached a property settlement and entered into a consent judgment of divorce. The pension provision of the divorce judgment acknowledged that the parties had "accumulated certain vested pension rights in and to a pension program through the Plaintiff's employment." Specifically, the judgment ordered that a Qualified Domestic Relations Order (QDRO) be entered so that, upon plaintiff's retirement, defendant would- be awarded "50%, or 1/2 of those benefits which [sic] have accrued during the time of the marriage."

The QDRO was drafted by plaintiff's counsel¹, signed by defense counsel, and entered by the court. The QDRO granted defendant survivorship rights and rights to plaintiff's early retirement subsidy, neither of which were mentioned in the judgment of divorce. This first QDRO and a subsequent version purporting to retract survivorship rights² were rejected by

¹ Plaintiff's original counsel, now Judge, Allen C. Yenior was the author of the original QDRO.

² The second QDRO was drafted by Curtis G. Broughton, who took on plaintiff's case after Judge Yenior was elected to the bench.

plaintiff's employer; thus, defendant could not recoup her one-half interest in the pension after plaintiff retired. On September 20, 2002, both parties entered motions to determine their respective rights and obligations under the judgment. The court, under a new judge, concluded that its predecessor had adjudicated these issues and intended to bind the parties by the original QDRO. Thus, the court ordered that an amended QDRO be entered entitling defendant to half of plaintiff's pension, including the early retirement subsidy and survivorship rights as well. Further, the court ordered plaintiff to pay \$800 per month in spousal support pending payment of the pension benefit. This appeal resulted.

II. EARLY RETIREMENT SUBSIDY AND SURVIVORSHIP RIGHTS

Plaintiff contends that the judgment of divorce evinced the parties' true intent and because that document did not contain language granting defendant interests in either the plaintiff's early retirement subsidy or survivorship rights in his pension, defendant should not be awarded those interests. Further, plaintiff contends that the original and subsequent QDRO's, drafted by plaintiff's original and intermediary counsel, which included these additional interests, do not themselves reflect the intent of the parties and therefore, should not bind the parties. Finally, plaintiff argues that the circuit court erred by extending spousal support pending payment of the pension benefits. We agree.

A. Standard of Review

The circuit court's factual findings will be upheld unless clearly erroneous. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). A factual finding is clearly erroneous if, after reviewing the entire record, the reviewing court is left with the firm conviction that a mistake has been made. *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002).

B. Analysis

This Court has held that separate and distinct components of pension plans must be specifically awarded in a judgment of divorce in order to be included in a QDRO. *Quade v Quade*, 238 Mich App 222, 224; 604 NW2d 778 (1999) (early retirement benefits held to be such a component), *Roth v Roth*, 201 NW2d 563, 569; 506 NW2d 900 (1993) (survivorship rights held to be such a component).

Here, page four of the divorce judgment succinctly ordered and adjudged:

[T]he parties have accumulated certain vested pension rights in and to the pension program through Plaintiff's employment...and that a Qualified Domestic Relations Order shall be entered so that defendant...shall receive 50%, or 1/2 of those benefits which [sic] have accrued during the time of the marriage....

Language dealing with early retirement or survivorship benefits, separate and distinct components of plaintiff's pension plan, is conspicuously absent from this governing paragraph. Therefore, defendant is not entitled to either benefit, despite QDRO language to the contrary.

Property settlement provisions in a divorce judgment are typically final and cannot be modified by the court. *Quade, supra* at 226. Absent fraud, duress, or mutual mistake, courts

must uphold divorce property settlements reached through negotiation and agreement of the parties. *Id.*

Here, defendant did not show fraud, duress or mutual mistake. Although there were clearly mistakes in the language of the QDRO's, those were unilaterally plaintiff's original counsel's, thus, not mutual. Therefore, since the QDRO does not conform to the judgment, it is invalid.

Finally, the monthly spousal support that was ordered pending division of plaintiff's pension was in error. Spousal support is the exception to the general rule that property settlements are final. A court may revisit support provisions at the behest of either party. *Staple v Staple*, 241 Mich App 562, 565; 616 NW2d 219 (2000). However, here the continuation of spousal support was not based on the court's alteration of the spousal support provision, but rather on the trial court's erroneous reliance on the terms contained in the original QDRO. Therefore, the award of spousal support was improper. On remand we instruct the trial court to enter an order based solely on the terms contained in the judgment of divorce.

Reversed and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette